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No. 73-1256

Supreme Court of the United States

OCTOBER TERM, 1974.

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae*, in support of the position of the respondent, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately 14,000,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

1. The petitioner in this case, Connell Construction Co., "a general contractor engaged in the construction industry

in Texas," alleged that the respondent Union violated the anti-trust laws by seeking and securing through the use of peaceful economic force (picketing) "a contract • • • whereby Connell agreed not to do any business with any plumbing and mechanical firm unless such firm was a party 'to an executed, current collective bargaining agreement' with the union." (*Connell Const. Co. Inc.* v. *Plumbers & Steam. Loc. U. No. 100*, 483 F.2d 1154, 1156 (C.A.5).)

Connell did *not*, however, allege that the Union action complained of was the product "of any conspiracy between the union and unionized subcontractors, nor does the proof allude to any such conspiracy;" instead Connell "bas[ed] its entire case on the theory that there was a sufficient anti-trust violation because the union had restricted Connell in the way that it carried on its business." (483 F.2d at 1165.)

Nor does Connell address, much less controvert the Court of Appeals' findings, fully supported by the record, that: in seeking and securing the subcontracting agreement the "plumbers' union is simply seeking to eliminate competition based on differences in labor standards and wages;" that the "agreement the union sought from Connell • • • is directly related to work attainment, work preservation, and other labor standards which directly benefit the members of the union involved;" and that "the only anticompetitive aspect [of the Union-Connell agreement] is that the unions have succeeded in eliminating that feature of competition based on lower standards or wages. There remain numerous other competitive devices." (483 F.2d at 1167, 1168, 1169.)[1]

[1] That court bottomed these findings on a meticulous review of the structure and practices of the construction industry:

Further, while Connell argues that the subcontracting agreement "cut[s] out" subcontractors from "the construction market" (Pet. Br. p. 18), there is nothing in the record to indicate that the Union's purpose was to restrict entry into that market; that any subcontractor, or class of subcontractors, who signed a collective agreement with the Union was unable to compete with the remaining subcontractors who observed union "labor standards and wages;" or, that the Union ever refused to sign a collective agreement with any subcontractor willing to meet union "labor standards and wages." The evidence is undisputed that the Union's "purpose [is] to try to organize the unorganized;" and that, for example, the Union had "tried to get a collective bargaining agreement with Texas Distributors," a non-union employer to whom Connell often subcontracted work, but that Texas Distributors "always seem[s] to back out at the last minute." (A. 79.) Thus, the subcontracting agreement does not foreclose the market for performing the subcontracts in question. The

"The central reason that the union wants the agreement sought in this case is that it will be helpful in organizing other subcontractors. The direct relation of this type agreement to that goal is clear. These agreements tend to eliminate any edge that a nonunionized subcontractor has in bidding on a job when that competitive edge rests solely or primarily on the fact that he pays less wages or grants lower working standards than the unionized subcontractor. Thus, the achievement of a contract such as the one here with Connell gives the union a strong weapon in its quest to unionize other subcontractors.

"It is clear in this case that the union is trying to get around an inherent situation which has long been recognized as making the construction industry unique in the field of labor relations. The core of this problem stems from the fact that work in the construction industry is ambulatory in na-

only condition for entry is that the subcontractor sign a collective agreement with the Union. So long as that condition is satisfied all options for entrepreneurial enterprise (other than those based on cutting "labor standards and wages") remain open.[2]

Accordingly, as this case reaches this Court it involves only an insistence by a union, acting pursuant to its own

ture and that there is a decided lack of continuity between the various parties—owner, general contractor, subcontractor, and employees—who are related to an individual project. The owner, of course, is basically the money source for the job which, by its nature, is obviously intended to be completed in a limited duration of time. The general contractor, with or without employees of his own, is the one who is actually in charge of getting the job done. As a general rule, the general contractor hires subcontractors, usually on the basis of competitive bids, who actually perform that construction which his own employees do not do. These subcontractors are independent businessmen and their relationship to the general contractor is limited to the duration of the job on which they are the successful bidder. The subcontractors have their own employees and in most instances the subcontractors are the immediate employers with whom the union has to deal.

"Thus, the union is faced with a fairly difficult problem because of the impact that the isolated general contractor has on the labor relations of the independent subcontractors. A permanent relationship with the subcontractor does not in any way ensure the union of a permanency of available work and thus differs from manufacturing where there is far more continuity between the parties dealing with the union and the ones in control.

"It can be readily seen that construction unions have a direct interest in seeing that general contractors hire subs using union labor • • •." (483 F.2d at 1167-1168.)

[2] In the Labor Management Relations Act, as amended, Congress has struck a careful balance between the rights of contractors, sub-

policy and in order to further its members' immediate and direct self-interest in the maintenance of union "labor standards and wages," that a contractor agree not to subcontract to employers whose employees perform work at less than union scale that is also performed by the union's members. The anti-trust laws do not reach such agreements.

2(a) With certain explicit exceptions not here relevant Congress has decreed that product markets shall be regulated through the system of commercial competition. In a series of enactments, beginning with § 6 of the Clayton Act and extending through the 1959 amendments to the Labor Management Relations Act, Congress has also de-

contractors, and unions in the construction industry. On the one hand, as demonstrated in the Union's brief, §§ 8(b)(4), 8(b)(7) and 8(e), permit unions in that industry (and the garment industry) to seek and secure subcontracting agreements of the type at issue here from contractors such as Connell. In all other industries union signatory subcontracting clauses are unlawful. (See Un. Br. pp. 11-32, and cases there cited.) On the other hand, the LMRA facilitates the entry of employers who are willing to meet union "labor standards and wages" into the construction market through § 8(f), which permits a compensating relaxation of the preconditions to collective bargaining set in §§ 7, 8(a)(2)& (5) & 8(b)(3). As the District of Columbia Circuit explained in *Local No. 150, International Union of Op. Eng.* v. *N.L.R.B.*, 480 F.2d 1186, 1188-1189: "Because of the unique situation in the construction industry" where "the vast majority of building projects are of relatively short duration" and where "labor agreements necessarily apply to jobs which have not been started and may not even be contemplated," § 8(f) "validates prehire agreements" in that industry, thereby dispensing with the generally applicable requirement "that a representative number of employees be hired and that a majority shall have designated the union as their bargaining representative prior to the execution of a valid exclusive bargaining contract."

termined that the labor market is to be regulated through a system in which working men and women are free to combine and to seek and secure agreements from employers establishing wages, hours, terms and conditions of employment. But these two markets are not watertight compartments. Thus, union activities in general, and union-employer agreements in particular, have an effect on commercial competition. To take the simplest possible example, employers cannot for long sell goods at less than the wage rate they pay their employees. In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-504 (hereafter "*Apex Hosiery*"), Chief Justice Stone stated the central principle for harmonizing the two disparate regulatory systems Congress has established:

> "[S]uccessful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See Levering & G. Co. v. Morrin [289 U.S. 103], supra; cf. American Steel Foundries Case, supra, 257 U.S. 209; National Ass'n of Window Glass Manufacturers v. United States, 263 U.S. 403."

In short, at least so long as the union is acting pursuant to its own policy (see pp. 7-13 *infra*), a union-employer agreement that constitutes a "direct frontal attack" (*Teamsters Union* v. *Oliver*, 358 U.S. 283, 294) on the "eliminat[ion]" of "differences in labor standards," whose effect on commercial competition is solely the consequence of eliminating those differences, is within the labor exemption to the anti-trust laws.

So far we are aware, during the 35 years that have elapsed since *Apex Hosiery* was decided there has not been so much as a word in any opinion in this Court questioning the basic principle stated therein (and just quoted). It is unnecessary at this juncture to review the period 1940 to 1964. In 1965, this Court in *Mine Workers* v. *Pennington*, 381 U.S. 657 (hereafter "*Pennington*") and *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676 (hereafter "*Jewel Tea*") summarized the legislative materials and the prior case law and then explored in depth the extent to which the anti-trust laws apply to union-employer agreements. While the *Pennington-Jewel Tea* Court was sharply split on other issues, the binding force of *Apex Hosiery* was explicitly reaffirmed without dissent.

In his opinion for the Court in *Pennington* Mr. Justice White delineated the contours of the problem by contrasting the type of employe-union agreement clearly outside the labor exemption with the type of agreement at the heart of that exemption. He first provided a paradigm of the former:

> "If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were chal-

lenged under the antitrust laws by the United States or by some party injured by the arrangement.

* * * *

"In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come." (381 U.S. at 663.)

Justice White then completed the contrast by stating:

"[W]ages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. * * * The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-504." (*Id.* at 664.)

And, in his *Jewel Tea* opinion Mr. Justice White (joined by Chief Justice Warren and Mr. Justice Brennan) hewed to the central lesson of *Apex Hosiery* in answering in the affirmative the question:

"[W]hether the marketing-hours restriction [at issue there] like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision through bona fide, arm's-length bargaining in

pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." (381 U.S. at 689-690; Footnote omitted.)

As Justice White explained:

"[A]lthough the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work." (*Id.* at 691.)

In other words, so long as the union, as a matter of its own policy, seeks and secures agreements that provide "immediate and direct" labor benefits, the labor exemption to the anti-trust laws applies even though the consequential "effect on [commercial] competition is apparent and real." That exemption does not apply, however, where the agreement is focused on the "product market" and where the union benefit is the "hope for better wages to come" as a consequence of the employers' monopoly profits.

Similarly, Mr. Justice Goldberg's opinion in both *Pennington* and *Jewel Tea* (joined by Justice Stewart and Harlan) rested upon *Apex Hosiery*:

"Section 6 of the Clayton Act made it clear half a century ago that it is not national policy to force workers to compete in the 'sale' of their labor as if it were a commodity or article of commerce. The policy was

confirmed and extended in the subsequent Norris-La-Guardia Act. Other federal legislation establishing minimum wages and maximum hours takes labor standards out of competition. The Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201-219 (1958 ed.), clearly states that the existence of 'labor conditions' insufficient for a 'minimum standard of living * * * constitutes an unfair method of competition in commerce.' 29 U.S.C. at § 202(a). Moreover, this Court has recognized that in the Walsh-Healey Act, 49 Stat. 2036, as amended, 41 U.S.C. §§ 35-45 (1958 ed.), Congress brought to bear the 'leverage of the Government's immense purchasing power to raise labor standards' by eliminating substandard producers from eligibility for public contracts. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507. See also Davis-Bacon Act, 46 Stat. 1494, 40 U.S.C. § 276a (1958 ed.). The National Labor Relations Act itself clearly expresses one of its purposes to be 'the stabilization of competitive wage rates and working conditions within and between industries.' 29 U.S.C. § 151. In short, business competition based on wage competition is not national policy and 'the mere fact of such restrictions on competition does not * * * bring the parties * * * within the condemnation of the Sherman Act.' Apex Hosiery Co. v. Leader, supra, 310 U.S., at 503.'' (381 U.S. at 710-711.)

Mr. Justice Douglas' *Pennington* and *Jewel Tea* opinions (in which he was joined by Justices Black and Clark) did not attempt a comprehensive restatement of the limits of the labor exemption. For, in his view (see 381 U.S. at 672-675, 735-736) both cases were controlled by the proposition, announced in *Allen Bradley Co.* v. *Union*, 325 U.S. 797, 808, that:

> ''Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.''

In *Allen Bradley*, that was the predicate for a finding of an anti-trust violation since there had been:

> ''industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups [the union-contractor-manufacturer combination] to boycott recalcitrant local contractors and manufacturers and to bar from the [New York City] area equipment manufactured outside its boundaries.'' (325 U.S. at 799-800.)

But *Allen Bradley* distinguished the class of cases governed by that holding from those governed by *Apex Hosiery:*

> ''Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted

> by the Clayton Act from the coverage of the Sherman Act. Apex Hosiery Co. v. Leader, supra, 310 U.S. 503. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts." (325 U.S. at 809.)

In sum, as Mr. Justice Brennan recognized in *Musicians Federation* v. *Carroll*, 391 U.S. 99, 106, while much concerning the labor exemption remains in doubt, the central and unanimous point of this Court's cases from *Apex Hosiery* through *Pennington* and *Jewel Tea* is that so long as the union is not aiding an employer conspiracy to restrain trade the "Norris-LaGuardia Act [has taken] all 'labor disputes' as therein defined outside the reach of the Sherman Act," and that this Court has therefore "recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards. United Mine Workers of America v. Pennington, 381 U.S. 657, 666."

Thus, in *Carroll*, the Court, drawing on the holding of *Teamsters Union* v. *Oliver*, 358 U.S. at 294, and on the "analyses of Mr. Justice White and Mr. Justice Goldberg in *Jewel Tea*," concluded that a union-imposed scale of prices (the "price list requirement") was "brought within the labor exemption under [a] finding that the requirement is necessary to assure that scale wages will be paid to [employee musicians]." (391 U.S. at 112.)

Since that is the law, there can be no doubt that the labor exemption applies in this case. For, the Court of Appeals found: that the record here contained no "proof * * * [of] any [employer-union] conspiracy" to restrain trade; that the evidence demonstrated that "the only anti-competitive aspect [of the Union-Connell agreement] is that the unions have succeeded in eliminating that feature of competition based on lower standards or wage:" and, that the subcontracting agreement was not simply "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" (*Teamsters Union* v. *Oliver*, 358 U.S. at 294), but, given the nature of the construction industry, the only direct and frontal means of attacking that problem. (See pp. 1-5 *supra*.)

(b) This conclusion is confirmed by a survey of the areas of disagreement manifested in the *Pennington*, *Jewel Tea* and *Carroll* opinions. For in each instance those disagreements stemmed from factors not present here.

In *Pennington* the controversy within the Court concerned the nature and the quantum of proof necessary to show the existence of an *Allen Bradley* conspiracy.[3] Mr. Justice White stated:

> "A union forfeits its exemption from the anti-trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true

[3] The Court returned to that issue in *Ramsey* v. *Mine Workers*, 401 U.S. 314, and there reaffirmed *Pennington's* holding. (401 U.S. at 312-313; see also *id* at 319-320 (Douglas J., dissenting).)

even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (381 U.S. at 665-666.)

Even that proposition was subject to the following qualification—of immediate significance here:

"Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to those which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency." (*Id.* at 665, n.2.)

Mr. Justice Douglas agreed, adding that:

"First. On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.

"Second. An industry-wide agreement containing those features is prima facie evidence of a violation." (*Id.* at 672-673.)

Mr. Justice Goldberg, however, disagreed, stating:

"The Court should hold that, in order to effectuate congressional interest, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." (*Id.* at 710; footnote omitted.)

Justice White's position was, therefore, that the antitrust laws govern union activity concerning working conditions undertaken to further an *employer conspiracy* to eliminate competitors, and that the existence of a multi-employer agreement containing a "most favored nations" clause is probative evidence of such a conspiracy; Justice Douglas also regarded proof of predatory purpose as essential but it was his view that such an industry-wide agreement is "*prima facie* evidence of a violation;" and, Justice Goldberg's position was that union activity concerning "mandatory collective bargaining is completely protected" (*id.* at 710).

In the instant case there is no evidence of an employer-union conspiracy "to eliminate competition from the industry," or that the Union's "wage scale * * * exceeded the financial ability of some operators to pay," or that the agreements in force were "made for the purpose of forcing some employers out of business." Rather, here as in *Jewel Tea*, the "case comes to [the Court] stripped of any claim of union-employer conspiracy against [the complaining employer]." (381 U.S. at 688.) Thus, the conflicting views with respect to the probative value of a multi-employer collective agreement in establishing the existence of an *Allen Bradley* conspiracy need not be resolved. (Compare 483 F.2d at 1162-1165 discussing *Pennington*, *Jewel Tea* and

the Fifth Circuit's synthesis of those cases in *Cedar Crest Hats, Inc.* v. *United Hatters*, 362 F.2d 322, 326-327.)

Jewel Tea involved the legality of a "restriction • • • ('market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday inclusive') • • • contained in a collective bargaining agreement executed after joint multi-employer, multi-union negotiations." (381 U.S. at 688.) As we have seen (pp. 8-9), Mr. Justice White stated that in the absence of an anti-competitive employer-union conspiracy, agreements that provide "immediate and direct" labor benefits are within the labor exemption even though the "effect on competition is apparent and real." Under that test:

> "[T]he dispute between Jewel and the unions essentially concern[ed] a narrow factual question: Are night operations without butchers, and without infringement of butchers' interests, feasible? The District Court resolved this factual dispute in favor of the unions. • • • [And,] Jewel's argument[s] • • • fall far short of a showing that the trial judge's ultimate findings were clearly erroneous." (*Id.* at 694; 697.)

As we have also seen, Mr. Justice Goldberg argued for a broader view of the labor exemption. (P. 15.) He therefore joined Mr. Justice White in concluding that no violation of the anti-trust laws had been proved in *Jewel Tea* although he disagreed with Justice White that it had been critical for the union to prove that "night operations without butchers and without infringement of butchers' interests [was not] feasible." (*Id.* at 727.) For Justice Goldberg it was sufficient that

> "[I]f the self-service markets could operate after 6 p.m., without their butchers and without increasing the work of their butchers at other times, the result of such operation can reasonably be expected to be either that the small, independent, service markets would have to remain open in order to compete, thus requiring their union butchers to work at night, or that the small, independent, service markets would not be able to operate at night and thus would be put at a competitive disadvantage. Since it is clear that the large, automated self-service markets employ less butchers per volume of sales than service markets do, the Union certainly has a legitimate interest in keeping service markets competitive so as to preserve jobs. Job security of this kind has been recognized to be a legitimate subject of union interest." (*Id.* at 727-728; footnote omitted.)

Finally, Mr. Justice Douglas apparently agreed with the test governing non-*Allen Bradley* cases stated by Mr. Justice White but disagreed that the union had demonstrated "a necessary connection between marketing hours and working hours." (*Id.* at 737-738.) He would have reversed the District Court's finding to that effect as contrary to the "undisputed" evidence. (*Id.* at 738.)

The distinction between the instant case and *Jewel Tea* is two fold, and in both particulars the difference cuts in favor of the Union here. First, in this case, in contrast to *Jewel Tea*, there can be no doubt that the subcontracting agreement provides "immediate and direct" labor benefits. Second, in the instant case there is no evidence that observance of uniform labor conditions places any employer at a competitive disadvantage or otherwise interferes with competition based on entrepreneurial skill as opposed to competition based on substandard labor conditions. In *Jewel Tea* the marketing hours restriction bore more heav-

ily on one class of employer (those operating self-service meat markets) in that it served to restrict competion through the means of "keep[ing] their doors open long hours to meet the convenience of customers." (381 U.S. at 737; Douglas, J., dissenting.)

The central issue in *Carroll* for present purposes was the legality of the "price list" to be charged by orchestra leaders for "club date" engagements imposed by the musicians' union. On that issue the Court stated: "The critical inquiry is whether the price floors in actuality operate to protect the wages of the [union-member-employee] subleader[s] and sidemen;" and agreed with the lower courts "that the price floors were expressly designed to and did function as a protection of sidemen's and subleaders' wage scales against the job and wage competition of the leaders." (391 U.S. at 108.) Mr. Justice Brennan went on to hold that the price list was lawful whether or not the orchestra leader was an active performer since "the price of the product—here the price for an orchestra for a club-date—represents almost entirely the scale wages of the sidemen and the leader * * * Therefore, if leaders cut prices, inevitably wages must be cut." (*Id.* at 112.)

Mr. Justice White joined by Mr. Justice Black, agreed with the majority that the "price list" was within the labor exemption so long as the leader

> "does work—playing and leading—which is also done by union members, and for which the union has a proper concern. The union thus has a right to see that the respondent does not perform that work for less than the going scale for union musicians and subleaders. Since the leader fixes a single charge to compensate him for both leading and organizing, the union can require the leader to make that charge not less than the union scale for a subleader plus the leader's costs in obtaining the engagement, hiring the musicians, and planning the program." (*Id.* at 116.)

But Justice White disagreed that the labor exemption covered the "imposition of fixed minimum charges by leaders for engagements at which they do not themselves lead":

> "For such engagements the role of the leader is solely that of entrepreneur * * *. The union has of course a full right to impose on this leader, who is in effect an employer, its minimum scale for work by sidemen and subleaders. The musicians union, however, goes further. * * * The union is clearly requiring that the leader charge his customer more than the total of the leader's wage bill, even though the leader himself does no 'labor group' work." (*Id.* at 117.)

Thus, Justice White, but not the majority, viewed *Carroll* as a case where in part the union imposed product market restraints unnecessary to protect its employee-members' labor conditions. Such a restriction would, as Justice White argued, be contrary to the central tenet of a system of commercial competition under the anti-trust laws and would be devoid of a compensating basis in the regulatory system Congress has evolved for the labor market. But, as we have stressed throughout, there is no such interference with commercial competition in the instant case. On the contrary, here the subcontracting agreement was the product of the Union's own policy and constituted a "direct frontal attack" (*Teamsters Union* v. *Oliver*, 358 U.S. at 294) on the "elimination" of "differences in labor standards" (*Apex Hosiery*, 310 U.S. at 503-504), whose effect

on commercial competition was solely the consequence of eliminating those differences. It is established beyond peradventure of doubt by this Court's decisions that such an agreement is within the labor exemption to the antitrust laws.[4]

[4] Connell, citing and relying on *Columbia River Packers* v. *Hinton*, 315 U.S. 143, 146-147, argues "Union has no labor dispute with Connell. It does not seek to represent a single employee of Connell, but only to regulate with whom Connell may do business, outside of any employer-employee relationship." But, as this Court later stated, *Hinton* involved only "a dispute between groups of businessmen revolving solely around the price at which one group would sell commodities to another group." (*Allen Bradley*, 325 U.S. at 807 n. 12.) The applicable precedent here is *Milk Wagon Drivers', etc.* v. *Lake Valley Farm Products*, 311 U.S. 91. In that case drivers employed by dairies under union contracts had lost their jobs because their employers were being undersold by other dairies who sold milk to independent vendors who owned and operated their own trucks and in turn sold the milk to previous customers of the union dairies. The union believed that the dairies who used the vendor system were able to sell milk at lower prices than the union dairies because "the vendors worked long hours, under unfavorable working conditions, without vacations, and with very low earnings." (*Id.* at 95.) Accordingly, it picketed and engaged in other activities to force the vendors into their union, where they would be forbidden to handle the milk as vendors. This Court unanimously held the controversy to be a "labor dispute" within the meaning of the Norris-LaGuardia Act, holding:

> "Whether rightly or wrongly, the defendant union believes that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's effort to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife." (311 U.S. at 98-99.)

In the instant case it is clear that the Union acted on the entirely rational belief that Connell's subcontracting of work to non-union employers was a "device utilized for the purpose of escaping the payment of union wages and the assumption • • • of union standards," and that the Union's response was directly and immediately "related to labor's effort to improve working conditions." (See pp. 1-5 supra.) Connell's attempt to make it appear that this is a case like that envisaged by Mr. Justice White in *Pennington* (in which a union cooperates with an employer restraint of commercial competition in a "hope for better wages to come" (381 U.S. at 663)) is the product of the Company's successful effort "to shut [its] eyes to the everyday elements of industrial strife."

Connell also attempts to inject into this case the employer-union conspiracy issue that was central to the *Pennington* litigation (see pp. 13-15 *supra*) by arguing that the subcontracting agreement is subject to attack since, until 1973, the underlying collective agreement between the Union and the subcontractors contained a "most favored nations" clause. (Pet. Br. pp. 12-16.) We agree with the Union that in this declaratory judgment action that argument was mooted when the clause was eliminated from the underlying collective agreement. (Un. Br. p. 10, n. 3, and cases there cited.) In any event, as Judge Swygert stated in *Associated Milk Dealers, Inc.* v. *Milk Drivers U., Local 753*, 422 F.2d 546, 554 (C.A. 7):

> "[A] majority of the Supreme Court in *Pennington* requires proof of predatory purpose as a prerequisite to finding that a most favored nation clause violates the antitrust laws."

There is no "proof of predatory purpose" in this case. (See pp. 1-5 *supra*.)

The Chamber of Commerce also ranges far afield by arguing that "whenever a union's conduct violates the proscriptions of the labor laws it forfeits its antitrust exemption." (C. of C. Br. p. 9, see *id.* pp 10-15.) That suggestion is too insubstantial to merit more than this footnote. As developed in the Union's brief, when Congress wished to regulate union activities that have an "immediate and

CONCLUSION

For the above noted reasons as well as those stated by the respondent the judgment of the Court of Appeals should be affirmed.

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direct" impact on labor conditions, that was accomplished through the prohibitions and the remedies declared in the LMRA, and a return to regulation through the anti-trust laws was explicitly rejected. (See Un. Br. pp. 32-43. For a complete discussion of the evolution of the labor laws in the respects relevant here, see also 381 U.S. at 700-709 (Goldberg, J., concurring and dissenting).) It is necessary to add only that while the Chamber relies on the *Carroll* case (C. of C. Br. p. 10), the precise contention it makes here was made by the cross-petitioner in that case (Br. for Cross—Pet. in Nos. 309-310, Oct. Term, 1967 pp. 71-72, 75-78) and was rejected—this Court holding that a union retained its labor exemption even where it required a closed shop and refused to bargain; both, of course, practices declared unlawful by the LMRA. (391 U.S. at 106-107.) The anti-trust laws and the LMRA are not concurrent overlapping regimes neither preempting the other, they are radically different systems of regulation each directed toward different ends in different markets. And Congress has determined to "proscribe union activities," that are not part of an *Allen Bradley* conspiracy, but are in Congress' "judgment • • • detrimental to the public good" (381 U.S. at 707 (Goldberg, J., concurring and dissenting)), exclusively through the LMRA.